judge of this court and therefore, this court is in a position to review the judgment of the High Court. We are afraid we are unable to understand this submission and we do not think there is any substance in it.

That submission does not seem consistent with the provision of article 122(2) and article 125(10). Clause (2) of article 122 requires nomination in each particular case by the Lord President before a judge of the High Court may sit as a judge of the Federal Court. Clause (10) of article 125 specially provides that a judge of the High Court, once he has been appointed to be a judge of the Federal Court, shall cease to be a judge of the High Court. It would appear that a Chief Justice is the only person who can sit both on the High Court and the Federal Court.

It was also urged before us that the word "may" in section 66 of the Judicature Act should be read to mean "shall", with the result that the judge's jurisdiction to reserve a matter for the decision of this court ceases to be a discretionary one. In this sub-section two different words connecting different meanings are intentionally used and in our view there cannot be any doubt that these words shall have their usual meaning. In other words, it is the clear intention of this sub-section that the jurisdiction of the High Court shall be a discretionary one where the party making the application is other than the Public Prosecutor. On the other hand, it is equally clear to us that it is the intention of this sub-section that the High Court would have no discretion but to admit an application where it is made by the Public Prosecutor himself.

In the circumstances, it is therefore our view that the decision of the High Court in exercise of its discretion under section 66 of the Judicature Act must be regarded as final and that this court has no jurisdiction to review it.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Jag-Jit Singh & Co.*

TAN TUAN CHIN v. CHEN WEI YIN & ANOR.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) August 7, 1967]

[Penang — Federal Court Civil Appeal No. X. 67 of 1966]

Landlord and Tenant — Tenancy of vacant land converted into premises by attap hut — Later demolished and new building erected — New lease — Time of erection — Control of rent excluded.

The appellant was a tenant of a piece of vacant land in 1946 paying a ground rent of $6 per month. He subsequently erected a temporary attap house. Then sometime in August 1948 the appellant with another took a lease of the same land for 7 years with a right to erect a building thereon. The building No. 93 Campbell Street was completed in 1949. On the expiration of the said lease the appellant took a further lease for 4 years with a provision that at the expiry of the further lease in 1960 he would be a monthly tenant of the premises. The further lease expired and the respondent terminated the monthly tenancy on October 31, 1964. The appellant refused to give vacant possession and the landlord obtained an order for possession from the Sessions Court. The appellant appealed to the High Court which dismissed his appeal. On appeal to the Federal Court,

Held: (1) it was not disputed that No. 93 Campbell Street was completed after January 31, 1948 and therefore not protected under the Control of Rent Ordinance;

(2) the appellant surrendered his old monthly tenancy of the land when he accepted the lease for seven years.

Per Yong J.: "Land by itself does not come within the definition of 'premises' as defined in the Control of Rent Ordinance, 1956. It becomes 'premises' only if it is occupied with a building or buildings there. A building is not a building within the Ordinance if it was completed after the 31st day of January 1948. If land, when let was vacant land and no building or buildings have since such letting, been erected thereon, such land does not come within the definition of 'premises'."

Cases referred to:—

(1) *Toh Ching Kwan* v. *Ng Ah Kak* [1955] M.L.J. 151.

(2) *Soong Co. Ltd. & Anor.* v. *Teoh Cheng Sim* [1956] M.L.J. 16.

(3) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

(4) *Mayor Singh* v. *Lau Geok Swee* [1960] M.L.J. 285.

(5) *Veerapillai* v. *Ooi Ewee Hoe* [1961] M.L.J. 260.

(6) *Nair* v. *Chidambaram* [1961] M.L.J. 264.

(7) *Syed Ahmad Al-Junied & Ors.* v. *Reshty* [1966] 2 M.L.J. 124.

(8) *Reshty* v. *Syed Ahmad Al-Junied & Ors.* [1966] 2 M.L.J. 121.

(9) *In re Savile Settle Estates* [1931] 2 Ch. D. 210.

(10) *Baker* v. *Merckel* [1960] 1 All E.R. 668 C.A.

(11) *Foquet* v. *Moor* (1852), 7 Exch. 870.

(12) *Chanan Singh* v. *Thiyagaletchumi* [1965] 2 M.L.J. 158.

FEDERAL COURT.

Jag-Jit Singh for the appellant.

A. Jayadeva for the respondent.

Cur. Adv. Vult.

Yong J.: This appeal arose out of the judgment of the Penang High Court which dismissed the appellant's appeal against the decision of the President of the Sessions Court, who had ordered him to deliver up to the respondents (landlords) vacant possession of that portion of the premises No. 93, Campbell Street, Penang, occupied by him and also to pay to them *mesne profits* at $45 per month from 1st October 1964 until delivery of possession.

Before us the appellant's counsel limited his appeal, as he had similarly done in the High

Court below, to one ground only, namely, "whether the premises in question is or is not protected by the Control of Rent Ordinance 1956."

It is not disputed that this building was completed after the 31st day of January 1948.

The learned judge of the Penang High Court in dismissing the appellant's appeal had held that the said premises were not protected by the said Ordinance, as they were erected after the 31st day of January 1948. Against that dismissal the appellant's counsel raised many points which may be summarised and grouped as follows. He contended that

(1) The character of the building or the date when it was completed was irrelevant in deciding whether the tenancy was or was not protected under the Control of Rent Ordinance 1956. This is a question of law.

(2) The appellant's tenancy had commenced in 1946 and "thereafter had continued without being terminated at all material times, during the whole of which time, the appellant was in possession of the land in question, on which he first erected a building of temporary character, and thereafter replaced it with a building of permanent construction which he himself later enlarged, all with the permission and consent of his landlord for the time being", and that the appellant had therefore enjoyed a "status of irremoveability" which is continued until the present day. This is a question of mixed law and fact.

On the appellant's first contention we have therefore to decide whether the character of the building or the date of its completion is or is not relevant in deciding whether the tenancy is or is not protected under the Control of Rent Ordinance 1956.

"Tenancy" is defined by section 2(1) of the said Ordinance to mean:—

"Any lease, demise, letting or holding of premises whether in writing or otherwise, by virtue whereof the relationship of landlord and tenant is created, howsoever such relationship may be described but does not include the letting or hiring of furnished rooms with board."

and "Premises" is defined as:—

"Any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building in which persons are employed or work and any part of any premises let or sub-let separately and includes any land, outbuildings and appurtenances occupied therewith, but does not include —

(a) new buildings completed after the 31st day of January, 1948."

It is clear and unambiguous that this Ordinance does not protect all premises. Only premises that come within its definition are protected, and new buildings completed after the 31st day of January 1948 are expressly excluded.

In the case of *Toh Ching Kwan* v. *Ng Ah Kak* [1] which was decided under the Control of Rent Ordinance 1948 as amended by Ordinance No. 61 of 1949 which had a similar definition as that contained in the 1956 Ordinance, and had defined "Premises" as:—

"Any dwelling house, flat, factory, warehouse, office, counting house, shop school, and any other building in which persons are employed or work and any part of any premises let or sub-let separately and includes any land whereon any such building is or has been erected with the consent of the landlord, but does not include —

(a) new buildings completed after the 31ts day of January, 1948."

Wilson J. held that

"although the definition of premises includes land, it only includes land upon which a building has been erected with the consent of the landlord, but a building does not include a building completed after the 31st day of January 1948. In my opinion 'premises' does not include land upon which a building was completed in 1952."

That decision was approved and followed in *Soong Co. Ltd. & Anor.* v. *Teoh Cheng Sim* [2] in which Spenser Wilkinson J. said:—

"whether or not I agreed with the decision in that case, I should feel bound to follow it; but in fact, with respect, I entirely agree with it, and would have reached a similar conclusion myself from the wording of the definition (of premises)."

In *Evelyn Saw Hee Li* v. *Gan Tit Sun* [3] and in *Mayor Singh* v. *Lau Geok Swee* [4] both of which were decided under the 1956 Ordinance, Rigby J. held that

"land, *qua* land, does not come within the definition of 'premises' "

in the Ordinance. In a later case in *Veerapillai* v. *Ooi Swee Hoe* [5] he however qualified his two previous decisions by holding that the words "premises in a tenancy" under section 12(1) of the Ordinance

"mean and include all those premises included in the tenancy as at the date of the application for a court order for possession and are not to be construed as being confined to premises which were originally the subject matter of the tenancy."

In *Nair* v. *Chidambaram* [6] Ong Hock Thye J. (as he then was) held that

"the date of erection (the buildings were erected in 1947) brings these premises within the definition of 'premises' in the Ordinance and the land itself by ceasing to be vacant land, becomes appurtenant to the premises. The appellant is consequently entitled to invoke the Ordinance against dispossession (by the landlord)."

After examining these and other authorities to the present day I have come to the conclusion that the consensus of better opinion is that land by itself does not come within the definition of "premises" as defined by the Control of Rent Ordinance 1956. It becomes "premises" only if it is occupied with a building or buildings thereon. A building is not a building within the Ordinance if it was completed after the 31st day of January 1948. I am therefore of the opinion that if land, when let was vacant land and no building or buildings have since such letting, been erected thereon, such land does not come within the definition of "premises".

On the other hand if land when let has a building of permanent character thereon or if

when let was vacant land and there has since such letting, been erected thereon a building or buildings of permanent character, then it is relevant for the court and indeed its duty to ascertain the date of the completion of such buildings. If they were completed after the 31st day of January 1948 they do not come within the definition of "premises" as defined in the Ordinance and are therefore not controlled and protected under the Ordinance.

If the building erected is of a temporary character, even if it was completed before the aforesaid date the court is empowered under section 12(1)(*l*) of the Ordinance to grant the owner an order to recover possession of such premises if he can satisfy the court that such premises are required by him for the erection of a building or buildings of a permanent character for which plans have been approved by the local authorities. The reason for the insertion of such a special sub-section in the Ordinance is obvious. It is for the promotion and improvement of modern town planning and for the protection of the owner who should not be prevented from developing his land merely because some sheds or temporary buildings have been erected thereon by the tenants.

The appellant's counsel has referred us to *Syed Al-Junied & Ors.* v. *Reshty,*[7] which was connected with *Reshty* v. *Syed Al-Junied & Ors.,*[8] both of which were decided under the Singapore Control of Rent Ordinance (Cap. 242). He argued that these cases brought the appellant's tenancy of vacant land within the definition of premises and in particular he relied on a passage in the judgment of Wee Chong Jin C.J. (Singapore) which reads,

"In the absence of special circumstances which do not exist in this case, it seems to me when a piece of land with a building or buildings on it is let and the land so let comes within the definition of 'premises' in section 2 of the Control of Rent Ordinance (Cap. 242), that this piece of land continues to remain controlled premises as long as it continues to be the subject matter of a single letting, notwithstanding that other buildings may have subsequently been erected on it. It is the land with a building or buildings on it that is the entity in such a case and the entity does not become a new entity simply because more buildings have been erected on it."

The learned Chief Justice's judgment must however be read in the light of the facts of that case. In that case, unlike our present case, there was no dispute that the subject matter of the action was not "premises" and in fact both parties in that case by their pleadings and their arguments before the court agreed that the subject matter of the action was "premises" within the definition of "premises" contained in section 2 of the Ordinance (Cap. 242). Moreover the buildings in that Singapore case continued to remain on the land during the material time, and only more buildings have been added to them. Whereas in our case, the temporary building (which was the only building) on the land was demolished and a new building built thereon. As this new building was completed after the 31st of January 1948, it was expressly excluded by the definition of "premises" and is therefore not controlled or protected under the Ordinance.

On the appellant's second contention, it appears to me that his counsel's argument is not in conformity with the facts of his case. The appellant claimed that he, in 1946, was a monthly ground tenant of a piece of vacant land comprised on a part of the land known as Lot 161(2) and Lot 161(3) in the Town sub-division 18, in the North-East District of Penang, on which he had built an attap shed. An attap shed is a shed roofed with leaves taken from attap palms. The appellant said that he paid a ground rent of $6 per month to his then landlord Alfred Tan.

On 16th August 1948 the appellant with one Ooi Seang Hee entered into a new agreement with his landlord Alfred Tan involving the same land, whereby he obtained a lease (hereinafter called "the 1st lease") for 7 years at a new rental of $50 per month and a right to build a building thereon. After getting the lease the appellant alleged that he demolished his attap shed and built on the land, the house known as premises No. 93 Campbell Street, Penang, which was completed sometime in 1949. This lease duly stamped and registered by the proper registering authorities of Penang was produced at the hearing in the sessions court and marked as Exhibit P-18.

In his evidence the appellant said:—

"I admit my signature appears on Exhibit P-18. I admit Ex. P-18 is a document of lease of the land to me for 7 years — lease was executed by me and one Ooi Seang Hee — landlord then was one Alfred Tan — Ex. P-18 was executed in a lawyer's office. I cannot remember what were the terms of that lease — after executing Ex. P-18 I built this building No. 93, Campbell Street — before building this house I demolished the attap shed."

This building No. 93 Campbell Street, Penang, was erected in accordance with plan No. 6273 (Exhibit P-12) duly approved by the then Municipal Council of Penang on 21st July 1948. The assistant architect, Mr. Poh Kuan Kiang, of the City Council of Penang, testified in the sessions court that the erection of this building commenced shortly after the said plan had been approved and like all buildings of this type, would take 6 to 9 months to complete. Therefore the date of this new tenancy or lease for 7 years, and the date of the completion of this building took place long after the 31st day of January 1948.

On 19th October 1951 Ooi Seang Hee assigned to Ng Kek Tong, all his rights and interests of that part of the said premises to which he was entitled and in which he was in

occupation.

On 31st December 1952 and before the expiration of the 1st lease, the appellant with Ng Kek Tong entered into another new agreement (hereinafter called "the 2nd lease") with his same landlord Alfred Tan in respect of the same land and building whereby they obtained a further term of 4 years commencing from the expiration of the term of the 1st lease, at a new rental of $90 per month.

This 2nd lease was duly stamped and registered by the proper registering authorities of Penang on 10th November 1953 and was produced at the sessions court and marked as Exhibit P-20. In respect of this Exhibit the appellant in his evidence said:—

"I agree that on 31st December 1952, I executed another document Exhibit P-20 in a lawyer's office — P-20 is the document and bears my signature. Under this document I was given an extension of another 4 years on the lease, making a total of 11 years in all. I admit that under this lease (2nd lease) P-20 I was allowed to build a second storey to this building — the lease was entered into also with Alfred Tan. I admit the 11 years lease expired in February 1960. After that I continued to occupy as a monthly tenant paying a rental of $90 per month."

Under clause 2(g) of the 2nd lease, the appellant and Ng Kek Tong agree that they would at the expiration of the terms created by the said two leases *"vacate from the whole of the said premises No. 93 Campbell Street, Penang, and hand over exclusive vacant possession of the said premises to the landlord, and from then onwards the said premises shall be the absolute property of the landlord."*

Clause 2(h) stipulates that should the tenants remain on the said premises after the expiration of the terms of the said two leases, they shall be deemed to be tenants on month to month basis.

This contractual monthly tenancy was terminated on 31st October 1964 by notice to quit issued by the solicitors of the respondents who had by then become the owners of the said premises.

The respondents became the owners of the said premises No. 93 Campbell Street, Penang, by virtue of an indenture of sale dated 20th August 1964 (Exhibit P-1) which recited the conveyance of the said premises from Alfred Tan to Pak Swee Meng (m.w.) and from Pak Swee Meng (m.w.) to the respondents. It also shows that the lands originally comprised in Lots 161 (2) and 161(3) were amalgamted with 5 other pieces of land held under Lots Nos. 160(2), 161 (1), 161(4), 161(5) and 161(6) and became part of one large Lot known as Lot 524. This large Lot was again sub-divided into four lots known as Lots 525, 526, 527 and 528 in the Town Sub-division 18, in the North-East District of Penang. The reason for this amalgamation and resub-division was that parts of the lands were required for the construction of Government roads and drains as insisted by the Penang City Council before they would allow the lands to be developed and proper buildings erected thereon. The premises No. 93 Campbell Street, Penang, are now standing on Lot 527 with a total area of 1366 square feet. The land on which the appellant had originally erected his alleged attap shed on a part of the lands held under Lot 161(2) and Lot 161(3) may or may not now be on Lot 527. It may be on a part of the lands now used for the Government's roads and drains.

The contention of the appellant's counsel that the monthly tenancy of the vacant land for which the appellant had been paying a ground rental of $6 per month still existed and had continued without being terminated, and he therefore enjoyed a "status of irremoveability" is to say the least, fallacious. Learned counsel had refrained from referring to the many changes of tenancy as disclosed by the evidence in the case. The law on these changes is well established and is clearly stated by *Halsbury's* Laws of England (Volume 23 page 686, 3rd edition) that:—

"A surrender by operation of law takes place when the lessee takes a new lease from the lessor during the term of the old lease, even though the new lease is for a shorter term than the residue of the old term. This surrender is founded upon estoppel and takes place without regard to the intention of the parties. The lessor has no power to grant the new lease except upon the footing that the old lease is surrendered and the lessee, being a party to the grant of the new lease, is estopped from denying the surrender. Consequently the acceptance of a new lease operates as a surrender of the old one."

In re Savile Settled Estates,[9] Maughan J. held that

"Any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy, and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder; and I would add that it may result from the mere alteration in the amount of rent payable, as seems to have been held in the case of *Donellan* v. *Road.*"

Maughan J. also held that

"An alteration of the existing lease so that it will operate for a term extending beyond the original terms, can operate, in law, only as a surrender of the old lease and a grant of a new one."

which was quoted with approval and applied by the Court of Appeal in *Baker* v. *Merckel.*[10]

The creation of a new tenancy in favour of the lessee and a third person who enters and occupies jointly with the lessee was held in *Foquet* v. *Moor* [11] to amount to a surrender of the old tenancy.

In *Chanan Singh* v. *Thiyagaletchumi* [12] it was held by Ong Hock Thye J. (as he then was) that an increase of rent by mutual agreement

between the lessor and lessee would amount to a grant of fresh tenancy in place of the old one. In the course of his judgment he said that

"In view of the rent increase that undoubtedly took place . . . . the question arises whether or not a new contractual tenancy has superceded when rent was raised by agreement to the higher rate."

A little later he said:—

"I am consequently of the opinion that even if I am bound . . . . in holding that the appellant's tenancy at $5 per month continued after 1958 without interruption, notwithstanding the transfer of Ngo Jin's half-interest, such tenancy no longer exists after it was replaced by the fresh tenancy at the higher rent."

On these authorities I am bound to hold that the appellant, by accepting a new tenancy or lease for 7 years from the lessor during the term of his old monthly tenancy, must be deemed to have surrendered his old one. In fact when the new lease took effect, the appellant ceased to pay his ground rent of $6 in respect of his old tenancy, but instead he paid $50 per month his landlord under the new lease (P-18) and this rent of $50 by another new lease (P-20) was further increased to $90 per month.

Since the 1st lease (P-18) for 7 years was granted to the appellant and Ooi Seang Hee on 16th August 1948 and the 2nd lease (P-20) for a further extended term of 4 years was granted to him and Ng Kek Tong on 31st December 1952 and the building known as No. 93 Campbell Street, Penang, was erected and completed long after the 31st day of January 1948, I hold that the said premises in question are not protected by the Control of Rent Ordinance 1956. I am therefore of the opinion that this appeal should be dismissed with costs here and below, and the deposit of $500 in court be paid out to the respondents towards their costs.

Azmi C.J. (Malaya) and **Pike C.J. (Borneo)** concurred.

Appeal dismissed.

Solicitors: *Jag-Jit Singh & Co.; Jagadeva, Zahir & Ismi.*

MERCANTILE BANK LTD. v. YOON SIEW KANG

[O.C.J. (MacIntyre J.) August 24, 1967]

[Ipoh — Civil Suit No. 2 of 1966]

Bills of Exchange — Cheques — Holder in due course — Delivery — Bills of Exchange Ordinance, 1949, ss. 2, 27, 29(1)(b), 30, 64.

Fraud — Duress — Onus of proof.

Conspiracy — Case to be decided on pleadings.

Negotiable securities — Notice of limited interest of person from whom security taken — Effect of.

Banking — Cheques — Alterations rendering them void as negotiable instruments — Holder in due course.

The defendant was a remisier of M. Ltd. a firm of stock and share brokers, and was related to the directors of M. Ltd. He issued cheques in favour of M. Ltd. who deposited them with the plaintiff as an overnight security. These cheques were returned to M. Ltd. by the plaintiff every morning and sent back to the plaintiff in the afternoon. The plaintiff called in the overdraft and had the cheques indorsed by M. Ltd. in its favour. The six cheques when presented by the plaintiff were dishonoured as the signatures of the defendant differed from the specimen signature. Further there were alterations in the dates on the cheques. The plaintiff claimed against the defendant as holder in due course. The plaintiff had in an earlier suit obtained judgment against M. Ltd. and its claim included the sums in respect of the cheques issued by the defendant. A winding up order was consequently served against M. Ltd. at the instance of the plaintiff before the plaintiff filed the present suit. The defendant contended that (i) the six cheques were not intended to be presented by M. Ltd. except under a specified contingency and that the plaintiff was aware of this restriction on M. Ltd., (ii) the plaintiff was not a holder in due course as the plaintiff did not obtain them in good faith or for value, (iii) the cheques were void because of the alteration of the dates, (iv) the cheques were presented in breach of faith and under circumstances which amounted to fraud, (v) the plaintiff having already obtain judgment in an earlier suit and the judgment included sums due on the cheques, the plaintiff was precluded from suing the defendant for the same amount, alternatively (vi) the action must fail because the plaintiff in presenting the cheques for payment was only acting as an agent for M. Ltd. and there was no consideration between the plaintiff and M. Ltd. in respect of these cheques. On the evidence,

Held: (1) the amounts entered in the cheques were fictitious and the cheques were delivered by the defendant after effecting certain alterations to render them void as negotiable instruments in order to assist M. Ltd. to obtain credit from the plaintiff;

(2) the defendant had failed to discharge the onus of proving fraud or duress in the case;

(3) M. Ltd. voluntarily endorsed the cheques and it must be presumed that it was intended to give effect to that endorsement;

(4) the plaintiff had notice that the cheques were given to M. Ltd. for purchase of shares and if the plaintiff's manager had taken the trouble to scrutinise them he could have found them worthless as negotiable instruments, there was therefore a wilful blindness and absence of enquiry on his part;

(5) when the holder of negotiable securities otherwise *bona fide* and for value takes from person whom he knows or suspects to have a merely limited interest he acquires no larger interest than him from whom he had taken. As such the plaintiff's claim must be dismissed with costs;

(6) it was not necessary to go into the other questions raised in the defence.

Cases referred to:—

(1) *Westminster Bank Ltd.* v. *Zang* [1966] 2 W.L.R. 110.

(2) *Stiles* v. *Guy* 160 E.R. 1137, 1139.

(3) *Earle of Sheffield* v. *London Joint Stock* (1888), 13 App. Cas. 333.

CIVIL SUIT.

N. T. Rajah for the plaintiff.

N. Sharma for the defendant.